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**BEFORE THE  
STATE OF WISCONSIN  
DIVISION OF HEARINGS AND APPEALS**

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Application of David Hildebrand	)	
for a Permit to Enlarge Millbrook	)	3-LM-94-027
Creek, Town of Menasha, Winnebago	)	3-LM-94-052
County, Wisconsin	)	

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**FINDINGS OF FACT, CONCLUSIONS OF LAW AND PERMITS**

Pursuant to due notice including publication hearing was held on May 12, 1996, at Oshkosh, Wisconsin before Jeffrey D Boldt, Administrative Law Judge.

In accordance with secs. 227.4 and 227.53(1)(c), Stats., the PARTIES to this proceeding are certified as follows:

David G. Hildebrand  
1829 Cold Spring Road  
Neenah, Wisconsin 54956-1117

Wisconsin Department of Natural Resources, by

Robin Nyffeler, Attorney  
P. O. Box 7921  
Madison, Wisconsin 53707-7921

Carol and Larry Fredrick  
1531 Jacobsen Road  
Neenah, Wisconsin 54956-1149

**FINDINGS OF FACT**

1. David Hildebrand, 1829 Cold Spring Road, Neenah, Wisconsin, 54956-1117, applied to the Department of Natural Resources for a permit to construct ponds connected to Millbrook Creek pursuant to sec. 30.19, Stats.

The applicant is also seeking a permit to re-position a culvert, pursuant to sec. 30 123, Stats.

The Department of Natural Resources issued a Notice which stated that unless written objection was made within thirty days of publication of the Notice, the Department might issue a decision on the permit without a hearing. A timely objection to the permit application was received by the Department from the Town of Menasha.

2. The applicant owns real property located in the NE 1/4 of SW 1/4 in Section 8, Township 20 North, Range 17 East, Town of Menasha, Winnebago County, Wisconsin. The above-described property abuts Millbrook Creek which is navigable in fact at the project site.

3. The applicant proposes to construct the two ponds as an enlargement to Millbrook Creek, which is tributary to Little Lake Butte des Morts. The first pond will be approximately 80 feet wide by 100 feet long and 9 feet deep with 8:1 sideslopes. The second pond will be approximately 240 feet wide by 500 feet long and 5 feet deep with 8.1 sideslopes. There is presently a smaller ponded area at the approximate location of the propose larger pond.

4. The purpose of the ponds is: 1) to make the property more appealing in connection with development of a residential subdivision; 2) to provide a stormwater retention area for this subdivision; and 3) to provide fill for a proposed U.S. Highway 10 expansion.

5. The objectors were concerned about the ability of Northern Pike to make their way up the creek to spawn. They believed the project would require a dam between the creek and the pond. However, the record was clear that the "dam" was in fact a culvert at the north end of the larger pond which would allow for free movement of fish in the area. The record indicated that the culvert would be placed in such a manner to facilitate movement of fish. Further, a permit condition requiring the applicant to keep the culvert free of debris has been added to protect the public interest in maintaining fishery values in the area.

6. An extensive study to determine the 100 year flood plain of Millbrook Creek from Cold Spring Road to the West Side Arterial was conducted in August, 1995, by the engineering firm Martenson & Eisele, Inc. (Ex. 2) The purpose of the study was to determine and compare the 100 year floodway with and without the proposed pond construction. The study concluded that construction of the proposed ponds would have no impact on the flood plain upstream of the ponds, beyond the Hildebrand property. The evidence was undisputed that no impacts were reasonably expected downstream of the proposed project site. The Town of Menasha withdrew its objection following completion of the floodway study.

7. The proposed culvert will not materially obstruct navigation, reduce the flood flow capacity of Millbrook Creek or be detrimental to the public interest and therefore meets the standards set forth in sec. 30.123, Stats..

8. The objectors were also concerned about erosion of fragile wetland areas along the creek near the project site. While there are no areas specifically identified on the Wisconsin Wetland Inventory Map, the concerns of the Fredricks are reasonable. However, DNR Area Water Management Specialist Terre Locke presented undisputed expert testimony that the project would not cause detrimental erosion impacts so long as specific best management erosion control measures were followed until all disturbed areas were stabilized. Further, a silt curtain must be placed at the upstream side of the culvert during construction activity. Top soil from the creek bank, and bed, containing a native seed bank, must be used as a top soil along the perimeter of the larger, downstream pond. This soil should also be spread on the first four feet of the pond bank to establish emergent vegetation. Side slopes of the pond should be at 8 to 1, which should facilitate growth of aquatic plants. The ALJ is convinced that significant adverse impacts relating to soil erosion should not occur so long as the project is undertaken and maintained in accordance with these permit conditions, set forth below.

9. The project will not injure the public interest in fish and game habitat upon compliance with the conditions attached to the permit specified hereafter. The ponds would provide habitat for waterfowl, shore-birds, and amphibians. Fisheries in the area should not be detrimentally impacted so long as the project is constructed and maintained in accordance with the permit conditions set forth below.

10. The proposed project will not injure public rights or interest if any subsequent development is done in a manner that will conform to the standards for shoreland and flood plain development contained in Chapters NR 115 and NR 116 of the Wis. Admin. Code. The project, under the circumstances that now exist, will not materially injure the rights of other riparian owners on any navigable body of water. The project will conform to the requirement of laws for the platting of land and for sanitation upon compliance with the applicable conditions of the permit relating thereto as hereinafter specified.

11. The proposed enlargement will not adversely affect water quality nor will it increase water pollution in Millbrook Creek or Little Lake Butte des Mortes. Locke testified that the project met all applicable requirements and could actually improve the water quality of the creek so long as subdivision stormwater does not drain directly into the pond. Locke was convincing that a permit condition requiring construction of a rip-rapped area to act as a filter of stormwater draining into the ponds.

### CONCLUSIONS OF LAW

1. The Division of Hearings and Appeals has authority to hear contested cases and issue necessary Orders in this case pursuant to secs. 227.43, 30.19 and 30.123, Stats.
2. The proposed project as described in the foregoing Findings of Fact herein constitutes an enlargement of a navigable body of water as provided in sec. 30.19(1), Stats.
3. The Division has jurisdiction under sec. 30.19, Stats., to issue a permit for enlargement of a waterway as proposed by the applicant, subject to the conditions stated in the permit.
4. The proposed culvert meets the standards found in sec. 30.123(4), Stats.

### PERMIT

AND HEREBY THERE DOES ISSUE AND IS GRANTED to the applicant a permit under secs. 30.19 and 30.123, Stats., to enlarge a navigable body of water as herein applied for, subject to the following conditions:

1. The waterway to be constructed shall be a public waterway (however, access to the pond must be gained in a lawful manner);
2. The permit shall be exercised in such manner as not to result in pollution of any navigable body of water (or to create a fish trap condition)(if connected);
3. The applicant, (his)(their) heirs, (its) successors, or assigns shall comply with any applicable requirements of laws for the platting of land and for sanitation and any applicable requirements of local zoning ordinances or the standards for the development of shorelands and flood plains in Chapters NR 115 and NR 116 of the Wis. Admin. Code;
4. Erosion prevention must be used during and after construction until all disturbed areas are stabilized;
5. A silt curtain must be placed at the upstream side of the culvert during construction;
6. The side slopes of the pond must be 8:1;

7. Top soil from the creek bank, bed and wetland must be used as a top soil on the perimeter of the down stream (largest pond). This soil must be spread on the first 4 feet of the pond bank to establish emergent vegetation;
8. The excavated material must be hauled to an upland site;
9. Rock riprap must be placed on the upstream and downstream side of the culvert on all banks;
10. The permit holder shall keep the culvert free of debris and in such a condition to allow the free movement of water and fish;
11. A copy of the permit shall be kept at the project site and available at all times during construction;
12. The Department shall be notified at the time of the completion of the project;
13. The applicant shall waive any objection to the free and unlimited inspection of the premises, site, or facility at any time by any employee of the Department for the purpose of investigating the construction, operation, and maintenance of the project; and
14. The permit shall expire two years from the date hereof if the proposed enlargement is not completed before such date.
15. This permit shall not be deemed to authorize or include any work or development other than specifically authorized herein. Acceptance of this permit shall be deemed acceptance of the said conditions.

#### ORDER

#### IT IS THEREFORE ORDERED THAT:

1. Any subsequent transfer of property on the enlarged waterway shall be conditioned on compliance with the provisions and conditions of the permit.
2. The Findings of Fact, Permit and Order herein be recorded with the Register of Deeds, Winnebago County, in connection with the land described herein, within 30 days after completion of the project, and the Department of Natural Resources be notified what volume and page it is registered on.

3. The applicant shall comply with all conditions contained in the permit herein.

Dated at Madison, Wisconsin on May 28, 1996.

STATE OF WISCONSIN  
DIVISION OF HEARINGS AND APPEALS  
5005 University Avenue, Suite 201  
Madison, Wisconsin 53705  
Telephone: (608) 266-7709  
FAX: (608) 267-2744

By   
JEFFREY D. BOLDT  
ADMINISTRATIVE LAW JUDGE

## NOTICE

Set out below is a list of alternative methods available to persons who may desire to obtain review of the attached decision of the Administrative Law Judge. This notice is provided to insure compliance with sec. 227.48, Stats., and sets out the rights of any party to this proceeding to petition for rehearing and administrative or judicial review of an adverse decision.

1. Any party to this proceeding adversely affected by the decision attached hereto has the right within twenty (20) days after entry of the decision, to petition the secretary of the Department of Natural Resources for review of the decision as provided by Wisconsin Administrative Code NR 2.20. A petition for review under this section is not a prerequisite for judicial review under secs. 227.52 and 227.53, Stats.

2. Any person aggrieved by the attached order may within twenty (20) days after service of such order or decision file with the Department of Natural Resources a written petition for rehearing pursuant to sec. 227.49, Stats. Rehearing may only be granted for those reasons set out in sec. 227.49(3), Stats. A petition under this section is not a prerequisite for judicial review under secs. 227.52 and 227.53, Stats.

3. Any person aggrieved by the attached decision which adversely affects the substantial interests of such person by action or inaction, affirmative or negative in form is entitled to judicial review by filing a petition therefor in accordance with the provisions of sec. 227.52 and 227.53, Stats. Said petition must be filed within thirty (30) days after service of the agency decision sought to be reviewed. If a rehearing is requested as noted in paragraph (2) above, any party seeking judicial review shall serve and file a petition for review within thirty (30) days after service of the order disposing of the rehearing application or within thirty (30) days after final disposition by operation of law. Since the decision of the Administrative Law Judge in the attached order is by law a decision of the Department of Natural Resources, any petition for judicial review shall name the Department of Natural Resources as the respondent. Persons desiring to file for judicial review are advised to closely examine all provisions of secs. 227.52 and 227.53, Stats., to insure strict compliance with all its requirements.